United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

74-2326

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 74 - 2326

In the Matter of

D. H. OVERMYER CO., INC. (New Jersey)

Debtor,

ROBERT P. HERZOG,
Receiver-Appellant
-and-
D. H. OVERMYER CO., INC. (New Jersey)
Debtor-Appellant,

v.

FLORENCE LAZAR, ET AL,

Landlord-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF AND APPENDIX OF FLORENCE LAZAR, ET AL, LANDLORD APPELLEES

HENRY & BRECKER
COUNSELORS AT LAW
40 EXCHANGE PLACE
NEW YORK, N. Y. 10005

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HENRY & BRECKER
Attorneys for Landlord-
Appellees
40 Exchange Place
New York, New York 10005
Telephone: 425-7440

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In the Matter

-of-

D. H. OVERMYER CO., INC.
(New Jersey)

Debtor.

In Proceedings for an Arrangement

73 B 1149

Robert P. Herzog,
Receiver-Appellant

-and-

D.H.Overmyer Co.,Inc.(New Jersey)
Debtor-Appellant

v.

Florence Lazar, et al,
Landlord-Appellees

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BRIEF OF LANDLORD-APPELLEES:
EDISON NO. 24

Statement of the Case

On November 16, 1973, D. H. Overmyer Co., Inc. (New Jersey) filed a petition for an arrangement with this court along with some thirty-five other affiliated debtors. A receiver, Robert P. Herzog, was duly appointed and was authorized to operate the debtor's business by orders of the Bankruptcy Court.

Florence Lazar, Myron Rutkin, Max Schulman,

Seymour Paskow, Sidney Osterweil, Jack Osterweil, Mae Osterweil, David M. Hauben and United Holding Co., Inc. as landlords, instituted a proceeding in the Bankruptcy Court for an adjudication, that their lease with the debtor was terminated and for permission to continue a certain action for ejectment pending in the Courts of the State of New Jersey or in the alternative for judgment directing the surrender of the subject premises by the receiver to the landlord. The Bankruptcy Judge rendered judgment in favor of the landlord finding the lease terminated and directed the receiver to surrender possession of the said property to said landlord. An appeal to the district court was taken by the receiver and debtor and a stay of enforcement of all judgments and orders was granted upon conditions. District Judge Werker affirmed the Bankruptcy Judge in a written opinion and order resulting in both the receiver and the debtor taking an appeal to this court. All stays of enforcement of orders have been terminated.

While the subject property is a building which the debtor has subleased to one subtenant, American Hospital, who engages in a manufacturing operation in

said building, the debtors' generally are in the business of leasing and owning properties and subleasing or leasing said properties to undertenants or tenants, which in many instances are the public in the operation of a public warehouse.

Incorporated in this brief as an appendix hereto is a copy of the within landlord's Brief on Appeal in the District Court, in accordance with leave granted by this Court while denying receiver-debtor's application for a stay.

This Court is most respectfully referred to said appendix (brief) for a full discussion of the authorities and principles of law governing the subject matter of this appeal and supporting the decisions below. Landlord confines himself in this brief to a rebuttal of assertions and issues raised in the receiver-debtor's brief on appeal, and will limit himself, in a discussion of authorites, to the narrow confines of these questions. Reference respectfully is made to the brief below (the appendix) for the authorities supporting the conclusions of law reached by both District Judge Werker and Bankruptcy Judge Babitt.

Statement of Issues

1. Did the Bankruptcy Judge and District Judge make sufficient findings of fact to justify and support their conclusions of law.

2. Were the District Judge and Bankruptcy Judge's findings of fact clearly erroneous.

3. Were the conclusions of law rendered by the District Judge and the Bankruptcy Judge correct.

4. Is the debtor's plan feasible and is the debtor capable of rehabilitation under Chapter XI.

5. Has any "windfall" been proven to exist in favor of the landlord should his lease with the debtor be terminated.

Summary of Argument

The central questions brought to this court is whether the receiver-debtor has demonstrated sufficient grounds to ignore the general principle that bankruptcy termination clauses in leases are enforceable and to invoke the recent narrow exception to this rule adopted by this court in the recent Queens Boulevard case.

Since it is the receiver who seeks to obtain the

extraordinary, i.e., disregard of the unequivocal expression of the parties' intent in their lease agreement which Congress expressly has recognized to be enforceable by §70(b) of the Bankruptcy Act, 11 U.S.C. §110(b), surely it is his burden, and the debtor's, to prove that the circumstances justifying this recently adopted exception to the general rule does in fact exist.

Instead, throughout these proceedings, the receiver assumes the exception to the general rule - that he is entitled to the suspension of enforcement of defaults in the lease agreement committed by the debtor - because of the very existence of the Chapter XI proceedings.

They (receiver and debtor) criticize two courts below for a failure to take evidence upon the feasibility of a plan and alleged misconduct of the landlord, while proof of neither subject was ever offered; and complain that findings of fact, even more extensive and detailed than already have been made - were required below. They ignore, however, that after all of their evidence was before the trial court, the findings of fact made amply supported the conclusions of law that the lease was terminated and the property should be returned to the

landlord. In essence their complaint in this appeal is that further evidence should have been adduced to disprove that the very narrow exception to the general principle was applicable herein.

By assuming that the holding in Queens Boulevard, which was limited exclusively to the facts of that case, overruled the long line of cases cited in the appendix and the statute itself, the receiver incorrectly adds to the landlord's burden of proving defaults under the lease, the further burden of proving that the grounds do not exist in this particular case to enforce the exception to the rule and refuse to enforce the termination provisions of the lease.

Of course, once landlord proved the defaults, the burden shifted to receiver to show circumstances mandating the exception. Landlord has proved ample grounds for the termination of the lease with debtor, i.e., nonpayment of rent and default under the bankruptcy clause, but the receiver has failed miserably in sustaining the burden which thereupon shifted to him. The record below is totally void of any evidence whatsoever of value or property which would pass to the landlord upon termination so as to constitute

a "windfall", and the record is void of any evidence that an arrangement proceeding would be hampered or interfered with by termination.

On the other hand, the record is replete with evidence that a rehabilitation of the debtor is impossible, that a plan is not feasible and of long suffering on the part of landlord by reason of continued defaults and inequitable conduct of the debtor.

Thus, landlord has gratuitously sustained the burden which receiver improperly seeks to impose upon him and has affirmatively proven themselves:

(i) that no equity exists in favor of the receiver-debtor;

(ii) that no windfall passes to the landlord upon termination;

(iii) that no rehabilitation of the debtor is possible so that termination cannot frustrate any purpose of the Bankruptcy Act.

Therefore, not only has the receiver-debtor failed to affirmatively prove the criteria necessary to invoke the extraordinary exception to the general rule; but the landlord has affirmatively proven that those criteria do not exist.

POINT I

THE FINDINGS OF FACT MADE BY DISTRICT JUDGE WERKER AND BANKRUPTCY JUDGE BABITT WERE NOT CLEARLY ERRONEOUS

Hereinafter set forth seriatum in tabular form are the findings of fact made by District Judge Werker (a District Judge has the power to make findings of fact on a review of a Referee in Bankruptcy's order, Carter v. Kubler, 320 U.S. 243 (1943); in re Yost, 117 Fed. 792 (M.D.Pa. 1902)) and Bankruptcy Judge Babitt, the pages in the receiver's appendix in which those findings are made, and the pages in said appendix or reference to the record wherein these findings are clearly supported by evidence in the record.

Honorable Henry F. Werker, District Judge
Findings of Fact

Page	Findings	Supporting Evidence Page or record.
12	"late rental payments,"	H24, 11.19-22
12	"nonpayment of rent;"	H61, 11.10-11 H30, 11.21-25 H33, 11.21-24 H31, 11.1-3
12	"failure to pay real estate and other taxes;"	H25, 11.19-33 H27, 11.3-8
12	"landlords began proceedings in state courts to recover possession of their properties."	H27, 11.3-8 11.16-25

12	Filing of an arrangement proceeding on November 16,1973 and the appointment of a receiver	Certified copy of docket entries, Documents A-F in Record on Appeal
15	"for a period of years prior to its filing under the Bankruptcy Act, Overmyer's conduct with respect to many of the landlords formed a pattern of consistent failure to meet its rent, repair, mortgage and tax obligations."	H24, 11.19-22 H61, 11.10-11 H30, 11.21-25 H33, 11.21-24 H31, 11.1-3 H25, 11.19-33 H27, 11.3-8 H27, 11.16-25
16	"The record is barren, on the other hand, of any conduct on the part of the landlords which could in any way be described as unfair, overreaching or vexatious."	Transcript of trial found in H1 through H142
17	"defaults were repetitive, long-standing and seriously impeded the financial position of the landlords."	H24, 11.19-22 H61, 11.10-11 H30, 11.21-25 H33, 11.21-24 H31, 11.1-3 H25, 11.19-33 H27, 11.3-8 H27, 11.16-25
17n.7	"The record does not contain proof of the value of any 'windfall'."	H103, 11.11-13 H102, 11.13,14 H105, 11.3-9 H86, 11.19-22
18	Debtor's Plan has been rejected by creditors' committee.	Certified copy of docket entries, Documents A-F in Record on Appeal does not indicate acceptance of the debtor's plan.

18	Debtor's plan separates creditors into Class 1 in which falls landlords whose properties have not been returned and Class 2 in which all other creditors, including landlords whose properties have been returned are gathered. It proposes to pay 100% of the Class 1 debts in cash upon confirmation and 100% of the Class 2 debts by paying 1% every other month which payments therefor would extend for a period of 16-2/3 years beyond confirmation of a plan.	Document 4 of Record on Appeal

Honorable Roy Babitt, Bankruptcy Judge

Findings of Fact

30	Debtor filed a petition under Chapter XI and a receiver was appointed.	Certified copy of docket entries, Documents A-F in Record on Appeal.
34	"When the Chapter XI petitions were filed virtually all of the debtor's were in substantial arrears to these landlord-purchasers."	H30, 11.20-25 H31, 11.1-3 H33, 11.21-24 H61, 11.10,11
34	"it is no where in dispute that the sum (arrears) is well in excess of $12,000,000.00, and the landlord-purchasers represent the largest of the creditors, by far, with whom the debtor hopes to deal in these arrangement proceedings."	Debtor's Brief on Appeal p.10

35	"Some landlords had begun proceedings in State Courts to regain their property..."	H25,11.19-23 H27, 11.16-25
39	Trials of landlords' proceedings to recover their property continued over a six month period.	Certified copy of docket entries, Documents A-F in Record on Appeal.
52	"The defaults were staggering."	Debtor's Brief on Appeal p.10 (in which debtor admits that liability to landlords whose properties have been returned and whose properties have not yet been returned aggregate $12,000,000.00.
52	There has been no tender of the rent arrears.	H1 through H142; Certified copy of docket entries, Documents A-F in Record on Appeal (there is no proof of offer of proof in the record that any tender of arrears has in fact been made.
53	Debtor has at least twenty properties.	Debtor's Schedules
54	The debtor's plan has not been accepted by creditors.	Certified copy of docket entries, Documents A-F in Record on Appeal does not indicate acceptance of the debtor's plan.

Appellants cannot dispute that each of the above findings have been made; nor can they dispute that the Record on Appeal substantiates each of these findings without ambiguity. This disposes of any question that the findings of fact were clearly erroneous and leaves the receiver-appellant with a remedy only if the conclusions of law are not supported by the facts which have been found.

POINT II

THE FINDINGS OF FACT MADE BY DISTRICT JUDGE WERKER AND BANKRUPTCY JUDGE BABITT ARE SUFFICIENT TO SUPPORT AND JUSTIFY THE CONCLUSIONS OF LAW MADE BY THEM.

Since the record below substantiates the accuracy of findings of fact which have been made and because these findings of fact clearly justify the conclusions which were reached below, District Judge Werker should be affirmed.

In essence, the Courts below have found that since 1969 Overmyer had been chronically late in paying rental (H.24, 11.19-22) and in June, 1973 a mortgage foreclosure action was instituted against landlord resulting from Overmyer's defaults (H.25, 11.1-10).

Overmyer's shoddy record of performance resulted in obliging the landlord to institute two (2) separate actions resulting from nonpayment of over one years taxes aggregating $65,000.00 and nonpayment of rent (H.25, ll.19-23, H.27, ll.3-8, H.27,ll.16-25). No rent has been paid for the months of August, September, October and November, 1973, all preceding the Chapter XI filing (H.30, ll.21-25, H.31, ll.1-3, H.33, ll.21-24); and there was due the landlord on the filing of the arrangement proceeding $27,000.00 (H.61, ll.10,11).

EQUITIES DUE THE RESPECTIVE PARTIES AND "WINDFALL" TO THE LANDLORD.

These facts alone disqualify Overmyer from seeking the equitable powers of a Bankruptcy Court to protect them from the contractual consequences of their numerous defaults, i.e., termination of the lease; and further the record is barren of any proof that a windfall will be bestowed upon the landlord should further equitable protection be denied Overmyer. Mr. Herzog minimizes equitable considerations and questions their applicability in asserting that by equating pre-Chapter XI defaults with unclean hands a Chapter XI debtor could never seek the

protection afforded by the Queens Boulevard exception. This is an obvious obfuscation of the real issue.

The receiver incorrectly suggests on page 62 of his brief that the District Judge disqualified Overmyer from equitable relief because of a prepetition default. It was the pattern of years of default; it was the failure to pay taxes for over a year; it was the failure to pay mortgage payments resulting in a foreclosure against the landlord; it was the necessity of instituting two (2) separate legal actions to obtain payment; it was this pattern of long suffering which cloaked Overmyer with the unclean hands that now embarrasses the receiver. It was not a single instance of default caused by overwhelming financial embarrassment. The receiver misleads this court in attempting to distort Overmyer's conduct. Contrary to his assertion on page 61 of his brief, Bankruptcy Judge Babitt made no finding or conclusion that Overmyer was entitled to the extra-ordinary protection of equity powers. And, the cases cited on page 62, Weaver, Fleetwood and Queens Boulevard, do not involve the longstanding pattern of defaults as exists herein. On the contrary, Queens Boulevard

involved a one month nonpayment which was tendered to but rejected by the landlord. In Weaver, all defaults had been cured and the trustee had arranged financial assurances for the landlord's protection. In Fleetwood, the opinion is not clear respecting the pattern of default. None of these cases, however, involve the continuous contemptuous conduct demonstrated by Overmyer and none of these cases justify the receiver's inaccurate assertion that the equitable standard applied by Judge Werker would be the same faced with a debtor committing the simple breach of one months rental payment as distinguished from "Overmyer".

The receiver is mistaken in seeking comfort in the state law disfavoring forfeiture for equitable consideration when this very same state law would have long since allowed the termination of the Edison #24 lease save for the patient exercise of equitable jurisdiction of the Bankruptcy Court which has already stayed the landlord for twelve (12) months from obtaining the rights aforded him by the State of New Jersey. Having failed to make a showing for equity he should be heard to complain no further. The receiver accuses District

Judge Werker and Bankruptcy Judge Babitt of unsupported findings of fact on pages 68 and 74 of his brief, when in fact it is he who is either misstating facts or misleading the court with respect to same. While he asserts the arrearages due landlord is $418,000.00 on page 68 and not the $12,000,000.00 found by Judge Babitt, his colleague in this appeal, the debtor, on page 10 of his brief, admits that the aggregate arrearages due the landlords is $12,000,000.00 as found by the Bankruptcy Judge. The receiver conveniently ignores the $11,500,000.00 due to landlords whose properties have been returned.

On page 74 he suggests that the landlord claimed the arrearages are $65,000.00 when in fact they were $16,800.00. Both statements are incorrect. The $65,000.00 relates to unpaid taxes due from Overmyer for which in order to collect, the landlord was required to institute a dispossession proceeding against Overmyer (H.27,11.4-9). And, the $16,000.00 figure similarily is incorrect in face of the uncontradicted testimony of Morris Stern (H.61, 11.10,11) that $27,000.00 was due the landlord at the time the Chapter XI petition was filed.

Receiver further misleads this court by reference to the "profitable" sublease in page 74 of his brief and suggests that the findings of fact below were inaccurate for failure to take cognizence of this "evidence". He emphasizes his Schedule A to his Brief on Appeal as proof of a long term profit and benefit to the owner of the leasehold to be derived from the sublease of the landlord's property.

Not only is Schedule A not in evidence at the trial below but many of its component parts totally conflict with the evidence below and have been properly rejected by the Bankruptcy Judge at trial.

With respect to Edison #24 the pre-Chapter XI default is understated by $9,200.00 since the figure in the chart is in direct conflict with the testimony at trial. The annual net profit of $73,583.00 in both Schedule A and on page 74 of the receiver's brief is an imposing figure when faced against the alleged 35 years remaining on Overmyer's leasehold. Both the schedule and brief fail to disclose that the entire property (from which the profit allegedly flows) is subleased to one subtenant, American Hospital (H.40,

11.6-11) under a sublease which terminates in April, 1975 (H.40, 11.6-11); and that because of prepayment of the last six (6) months rental by the subtenant ($91,000.00) (H.47,11.19-25) the receiver's right to income and the net profit ends this very month. Furthermore, receiver omits Mr. Stern's testimony that subtenant has stated its intention to remove from the property at the end of the term and has not signed a new lease (H.41, 11.6-13) and has stated it was willing to expend $500,000.00 to move to San Antonio, Texas (H.42, 11.6-8); and that the sublease rental is not available in the rental market in New Jersey (H.46, 11.13-15).

Based upon this testimony and the absence of an offer of proof regarding the intentions of the subtenant and the availability of other subtenants, both District Judge Werker and Bankruptcy Judge Babitt refused to consider this short term sublease which expires in early 1975 as evidence of any substantial value of the Overmyer leasehold from the landlord. All efforts to introduce expert testimony respecting the value of this leasehold was rejected by Bankruptcy Judge Babitt (H.103, 11.11-13; H.102, 11.13,14; H.86, 11.19-22; H.105, 11.3-9). District Judge Werker considered this

offer of proof by the receiver and in Note 7 in his opinion (App.17,18) he expressly disregards this "chart" and finds, "The record does not contain proof of the value of any 'windfall'". Adopting the same reasoning which impelled Bankruptcy Judge Babitt to exclude the expert testimony of the alleged value of the Edison #24 leasehold, District Judge Werker expounds that the existing profit on a sublease about to expire does not justify an assumption that these profits will continue for the thirty (30) or forty (40) years in which Overmyer continues to have a right to occupy space as tenant. The details of District Judge Werker's reasoning are amply expressed in the said footnote.

Receiver's suggestion in page 24 of his Brief on Appeal that two (2) courts below ignored the "substantial value" of Overmyer's Edison #24 leasehold and thereby closed their eyes to the windfall which termination bestows upon the landlord, is contrary to the facts in the record and consistent with the receiver-debtor's failure to observe what has been evident to all parties in this proceeding.

Continuing in this pattern to mislead, receiver selects the narrowest of quotes out of context on page 69 of his brief to suggest that both the landlord and Bankruptcy Judge agree that the landlord's purpose in seeking recovery of his property is his desire to arrogate to himself the long term substantial profit to be derived from the sublease of landlord's property. In fact the value which the witness acknowledged to exist was the then existing positive cash flow provided by the surplus of sublease rental in excess of the base lease rental, which positive cash flow is about to expire. The quote from the statements made by Bankruptcy Judge Babitt, which appears approximately 70 pages in testimony subsequent to the quote from the witness' testimony is a reference not to the value which the sublease or leasehold would have upon reversion to the landlord but is Bankruptcy Judge Babitt's reaction to the continued efforts of the receiver to put in evidence expert testimony as to value which the Bankruptcy Judge had already excluded. It is this evidence which he comments on by stating, "I don't even know why you bother with any of this." And, his statements as to value is merely

the same recognition given to the positive cash flow by the witness. Had the Bankruptcy Judge determined that a sublease to one tenant which expired in just a few months was relevant to proving a value for a 35 year leasehold (which is suggested by the receiver by his misleading quotes on page 69 of his brief) then the Bankruptcy Judge would not have refused to admit the expert's testimony into evidence.

Receiver suggests on page 69 of his brief that the landlord wants the property back because of its profitability. The record denies the accuracy of this assertion and the landlord testified otherwise under oath. In view of the record is it any wonder that Mr. Stern stated, "I don't feel (a) that I want Overmyer as a tenant. I feel that Overmyer gave us a ..(cut off by the Referee)." A sufficient inference can be drawn from the record to supply the missing verb and adverb without further suggestion by the author. The refusal (conclusion of law) of both courts below to excuse the defaults committed by Overmyer and suspend the natural consequences of said defaults, i.e., termination of the lease, is amply supported by the findings of fact that

no "windfall" will redound to the landlord.

FEASIBILITY-REHABILITATION OF DEBTOR

The decision below should be affirmed because upon the evidence in the record the debtor cannot be rehabilitated, the plan is not feasible and a confirmation cannot occur.

Both District Judge Werker and Bankruptcy Judge Babbitt concluded the debtor's plan was not feasible and District Judge Werker went further and concluded that the debtor could not be rehabilitated. These conclusions are amply supported by the findings of fact in the two decisions below. The receiver emphasizes the $418,000.00 allegedly due the landlords whose properties are the subject of appeals before this court and the ease with which this sum could be paid upon confirmation of a plan from the alleged $520,000.00 of annual profits to be generated from these properties (receiver's Brief on Appeal p.40); and the debtor joins in this theorizing in its Brief on Appeal. They both ignore payment of $11,500,000.00 payable over 16 years 8 months as provided in Class 2 of their plan. According to this plan some $11,500.00 every other month or $69,000.00 per year is paid

over a 16 year 8 month period until some $11,500,000.00 is paid. Feasibility, according to that venerable treatise, Collier, on Bankruptcy is:

> "The test (is) whether the things which are to be done after confirmation can be done as a practical matter under the facts." 9. Collier, on Bankruptcy p.287 (14th Ed.)

In holding a fifty (50%) percent payment plan payable over 5 years not to be feasible, a Court of Appeals held in a Chapter XI:

> "In determining whether a plan is feasible, the Bankruptcy Court has an obligation to scrutinize the plan carefully to determine whether it offers a reasonable prospect of success and is workable." United Properties, Inc. v. Emporium Dept. Stores, Inc., 379 F. 2d 55,64 (8th Cir.1967)

This court, in refusing to transfer an arrangement proceeding under Chapter XI to a reorganization proceeding under Chapter X, in considering the feasibility of an arrangement spoke as follows:

> "The feasibility of the arrangement, must be examined with a view toward determining whether in the absence of elaborate procedures provided for by Chapter X, and considering the debt and corporate structure of the particular petitioner, there is a reasonable likelihood that the desired financial recovery will be effected without unduly prejudicing

> the rights of any interested parties." In re Transvision, Inc. 217 F.2d 243,46 (2d Cir. 1955)

Where the prospects of performing the obligations created by a plan cannot be supported by existing circumstances, the plan is not feasible. In re 1688 Milwaukee Corp., 99 F.2d 686 (7th Cir.1938); Wayne United Gas Co. v. Owen Illinois Gas Co., 91 F.2d 827 (4th Cir.1937). The debtor's unrealistic proposal of a 16 year 8 month pay out suggests something less than a good faith effort on its part to work out a practical and fair settlement with its creditors; if not an outright insult to the intelligence of those with whom it deals, including the Bankruptcy Judge. It is no wonder that he characterized it as a "pie in the sky" scheme (App.53). Even an honest effort to settle with creditors will not be indulged when not feasible.

> "However honest in its efforts the debtor may be, and however sincere its motives the district court is not bound to clog its docket with visionary or impractical schemes for resuscitation." Tennessee Publishing Co. v. American National Bank, 299 U.S. 18, 22 (1936)

No evidence has been offered to demonstrate

these payments would be met and there is nothing before the court from which it could conclude a reasonable probability that payments, years into the future, can be made by this debtor. Therefore, the plan is not feasible. No complaint can be heard from the appellants that a hearing was never conducted to determine feasibility. Surely, others cannot be penalized by their failure to make an offer of proof. If, in fact, evidence existed that the plan was feasible their failure to offer this evidence to the court is sufficient to deny them their grievances at this time. However, within the four walls of the plan itself a conclusion of feasibility cannot be rendered because any effort to speculate on ability to make payments 5, 10 and 15 years into the future is pure conjecture and cannot satisfy the quantum of proof required to support a plan as feasible.

Nor, should feasibility even be considered when the plan has never been accepted by the creditors. While this plan was filed early in the arrangement proceedings no acceptances have been forthcoming from the debtor or its creditors. The absence of acceptances to the plan is explained not merely by its unrealistic, impractical

and unworkable terms but also from the fact that the very creditors from whom acceptances are sought are a long list of landlords aggrieved by Overmyer's conduct. Absent an acceptance of the plan pursuant to §362 of the Bankruptcy Act, 11 U.S.C. §762, the court never considers the feasibility of such a plan, which is a requirement under §366(2) of the Bankruptcy Act, 11 U.S.C. §766(2). Because feasibility is a condition precedent to confirmation of a plan under §366, which cannot occur until first the plan is accepted under §362; the Bankruptcy Court cannot be criticized for failure to hold a "feasibility hearing".

Nevertheless, even without such a hearing the record suffices for a conclusion that the plan is not feasible, and for a conclusion that the debtor cannot be rehabilitated, i.e., a plan confirmed; because it has not been accepted by creditors.

A brief reference to the confusion caused in page 42 of the receiver's Brief on Appeal is in order. While quoting first from Bankruptcy Judge Babitt's comments respecting Tampa 3 followed by a quote from the District Court labeled "in affirming" it infers that Bankruptcy Judge Babitt's decision in Tampa has been affirmed by the

District Court, when in fact this appeal is still sub judice. Even if the distorted interpretation given Judge Babitt's decision that the Florida Chapter XI plan is feasible, or that feasibility is not a criteria in determining the Queens Boulevard exception, which obviously is not the case at all; District Judge Werker's opinion in this appeal surely overrules such unwarranted interpretation of Bankruptcy Judge Babitt and becomes the fule of this case - that is, that the debtor's plan is not feasible and that feasibility is one of the elements in determining whether a case merits the exception to the rule.

POINT III

THE CONCLUSIONS OF LAW REACHED BY DISTRICT JUDGE WERKER AND BANKRUPTCY JUDGE BABITT ARE CORRECT.

Using the receiver's own three (3) criteria for determining whether termination of a debtor's lease should be suspended:

(i) Forfeiture of valuable assets.
(ii) Rehabilitation of the debtor.
(iii) Windfall to the landlords. ;

no case whatsoever has been made for refusal to enforce the debtor's contract with its landlord and terminate the subject lease. Irrefutable findings of fact demonstrate no valuable asset is about to be forfeited since Overmyer's

sublease expires in a few months and there is no evidence of any replacement; thus there is no windfall to the debtor. And, irrefutable findings of fact demonstrate the rehabilitation of the debtor is impossible.

Thus, when two Judges below have concluded that the general principle of law respecting the enforcement of leases should be followed and that the special exception created under extreme circumstances should not be followed, no error requiring reversal has occurred.

Receiver's belated complaint on page 35 of their brief that they should be given a new trial to establish misconduct on the part of the landlords, insults the most basic knowledge of the law which surely is imputed to the receiver and his counsel. If, in fact, misconduct on the part of the landlord is an issue in determining whether the lease should be enforced, an offer of proof of such misconduct, never made by the receiver or debtor, is surely a prerequisite for their relying upon such irrelevant allegations in this appeal.

CONCLUSION

The landlord's lease with Overmyer should be terminated because:

(i) Landlord has proven substantial defaults occuring prior to the Chapter XI which never

have been cured.

(ii) The debtor has defaulted under the bankruptcy termination clause of said lease.

Nothing has been proven to merit the departure from the ordinary rule of law applicable to such default and the landlord therefore, is entitled to a return of his property because the lease has been terminated.

Respectfully submitted,

HENRY & BRECKER, ESQS.
Attorneys for Florence Lazar,
et al, landlord-appellees

MARTIN F. BRECKER
as Counsel.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter

-of-

D. H. OVERMYER CO., INC., (incorporated under the laws of the State of New Jersey), 73 B 1149

Debtor.

FLORENCE LAZAR, et al,

Appellees,

v.

ROBERT H. HERZOG, Receiver of D. H. OVERMYER CO., INC., and D. H. OVERMYER CO., INC., EDISON #24.

Debtor-Appellants.

----------x

(Appellee*)
LANDLORDS-APPELLANTS BRIEF
ON APPEAL.

* landlord inadvertently and incorrectly designated himself appellant rather then appellee.

STATEMENT OF THE CASE.

Lazar instituted a proceeding in the Bankruptcy Court for an adjudication that her lease with the debtor was terminated and for permission to continue a certain action against the debtor and its subtenant, American Hospital, in the nature of ejectment, to clear title to her real estate. After trial and deliberation, the Bankruptcy Judge rendered his decision, granting Lazar's application but staying enforcement of his order, thereafter made, until the receiver and debtor's appeal, if taken, was first heard by the District Court. This appeal came on before Judge O'Connor on the 27th day of August, 1974, who extended the stay upon condition that the receiver pay appellant (and other landlords of the debtor similarly situated) use and occupation in amounts fixed by the Bankruptcy Judge for the months of July and August, 1974.

FACTS.

Debtor, an affiliate of thirty-five (35) corporations, is a wholly owned subsidiary of one corporation, all of which are debtors in arrangement proceedings filed

in this Court on the 16th day of November, 1973 (Rec. br. p. 6). These debtors, operating as a single unit, owned or operated over two hundred (200) real estate facilities which it leased or subleased (D's br. p.1).

Lazar, who purchased the land and buildings from the debtor, thereupon entered into a twenty (20) year lease agreement with the debtor (R., Ex. 1, 1a) which expires in 1969 (R. p. 37, ll 14-16). Debtor is party to a sublease agreement with American Hospital which terminates on April 4, 1975 (R. p. 40, ll 6-11); and under which the subtenant is obligated to pay to the debtor sublease rental which exceeds the base lease rental payable to Lazar, by the sum of $84,000.00 (R. p.39). The subtenant, American Hospital, has prepaid sublease rental to the debtor in the sum of $91,000.00 which constitutes sublease rental for the last six (6) months of the subleased term (R. p. 47, ll 19 - 25); consequently, the receiver can look forward to continuing income under this sublease only through the month of November, 1974, which is calculated to be approximately $6,100.00 per month by the receiver's own Exhibit A to its brief on appeal.

There is no other evidence whatsoever in the record respecting the value of any property which would pass or revert to Lazar upon enforcement of the Bankruptcy Judge's order adjudicating the subject lease terminated. Yet, it is argued, that the decision below must be reversed because its effects constitute a windfall or unjust enrichment for the landlord and, further, that its enforcement would frustrate the purposes and success of the debtor's arrangement proceeding.

The fact that Lazar paid for the real estate and building, which would now revert to her, in 1969 when she purchased the building from the debtor and leased it back to them, is ignored by the receiver and forgotten by the debtor (R. p. 58, ll 3 - 12). The fact that the sublease which allegedly gives value to debtor's interest, expires in April 1975 and that the sublease rental terminates in November, 1974, is ignored. The fact that there is no evidence whatsoever of the rental value of the subject premises upon the termination of the sublease and certainly no basis to infer that a similar sublease rental would be available, is not considered by the debtor-receiver who merely assume in

their argument that the existing sublease income will continue for the next thirty (30) years. Finally, it is assumed that the loss of this one property to the debtor-receiver will frustrate and prevent the arrangement proceeding of these thirty (30) some odd debtors which have always been treated as one prior to and throughout the Chapter XI.

Thus, equitable considerations are urged by a debtor in absence of demonstrating any need for raising the hand of equity save for the preferring of one private economic interest to another. And who is this party that seeks the invoking of equitable jurisdiction.

In the summer of 1971, Overmyer defaulted in mortgage payments required of it under its lease with Lazar (R. p. 22, ll 20 - 25); which resulted in a mortgage foreclosure action instituted against Lazar (R. p. 25, ll. 1 - 10). Lazar instituted a dispossess proceeding against Overmyer for failure to pay over one year of taxes (a lease obligation) involving $65,000.00 (R. p. 27, ll. 3 - 8). Still another action, this time for ejectment, was instituted in October, 1973 for non-payment of rent (R. p. 27, ll. 16 - 25); the arrearages due the landlord through the filing of a petition for an arrangement was $27,000.00, (R. p. 61, ll. 10 and 11).

The Bankruptcy Judge held that the termination clause in Lazar's lease (and in other leases similarly brought before the Court) were enforceable and were breached by the filing of the petition for an arrangement and, finally, that the lease therefore was terminated.

Lazar asked this Court to consider not only the accuracy of the Bankruptcy Judge's conclusion, that bankruptcy termination clauses in leases are enforceable, but, further, asked this Court to consider the record of the trial below respecting the property known as Edison #24; and to treat this individual proceeding as any other trial in bankruptcy which would be brought before this Court for a determination whether the Bankruptcy Judge's conclusion of law aforesaid is substantiated by the facts in the record below. Lazar emphatically urges that the answer to both these questions should be affirmative.

POINT I

TERMINATION PROVISIONS IN LEASE AGREEMENTS ACTIVATED BY BANKRUPTCY PROCEEDINGS ARE VALID AND ENFORCEABLE IN THIS CIRCUIT.

The paragraphs in the subject leases which provide for a cancellation of lease in the event of the

filing of a proceeding in bankruptcy, including either a reorganization or an arrangement, are enforceable and upon the issuance of appropriate notice in conformity with the lease, impels its forfeiture. In re Walker, 93 F.2d 281 (2d Cir. 1937). This case has been uniformly followed in our Circuit. Speare v. Consolidated Assets Corp., 360 F.2d 882 (2d Cir. 1966); B.J.M. Realty Co. v. Ruggieri, 326 F. 2d 281 (2d Cir. 1964); Geraghty v. Kiamie Fifth Avenue, 210 F.2d 95 (2d Cir. 1954).

The authority for this principle of law governing our Circuit is drawn from Section 70(b) of the Act, 11 U.S.C. Sec. 110(b):

> "A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same is enforceable". (Emphasis added.)

This has been construed by our high Court as being applicable to reorganization proceedings under Chapter X, Finn v. Meighan, 325 U.S. 300 (1945) and

with equal persuasion to arrangement proceedings under Chapter XI, Speare v. Consolidated Assets Corp., supra; Geraghty v. Kiamie Fifth Avenue Corp., supra.

POINT II.

THIS PRINCIPLE IS THE GENERAL RULE FOLLOWED BY FEDERAL COURTS THROUGHOUT THE UNITED STATES.

Other courts have upheld cancellation provisions in leases and have found them to be binding in Chapter proceedings for relief of debtors. Robinson v. Hadley, 351 F.2d 385 (9th Cir. 1965); in re Technical Marine Maintenance Co., 169 F.2d 548 (3rd Cir. 1948); Floro Realty & Investment Co. v. Steem Electric Co., 128 F.2d 338 (8th Cir. 1942); Urban Properties Corp. v. Benson, 116 F.2d 321 (9th Cir. 1940); in re Dan Cohen Co., 221 F. Supp. 447 (S.D.Ohio 1963).

In fact, a refusal to enforce the contract between the parties respecting cancellation has been declared to be an unconstitutional denial of the landlords' property without due process of law. In re Technical Marine Maintenance Co., supra.

POINT III

BANKRUPTCY JUDGE BABITT WAS CORRECT IN ADJUDICATING THE LAZAR LEASE TERMINATED BECAUSE OF OVERMYER'S BREACH OF THE BANKRUPTCY TERMINATION CLAUSE.

Judge Babitt followed ample authority in determining the bankruptcy clause enforceable and in holding the lease terminated by virtue of its breach.

The arguments that his holding works a forfeiture of debtor's rights causing a windfall or unjust enrichment to the landlord or would even frustrate the possibility of confirming an arrangement, are totally unsupported by facts in the record; are in fact directly refuted by evidence in the record properly brought before this Court; and, finally, as later will be demonstrated, even if true, do not constitute a mandate requiring the Bankruptcy Judge to waive or excuse the default and enforce the lease agreement contrary to the intentions of the parties.

Morris Stern, Lazar's attorney and manager of the subject property, testified that American Hospital, the subtenant, is contemplating moving to Texas (R. p.41, ll. 6 - 13), and that "they were willing to spend one-half million dollars to go to San Antonio, Texas", (R. p.42, ll. 6 - 8). Even if a possibility exists that this subtenant might enter into a new lease with the landlord this conjecture that American might enter into a lease

with Lazar in the future, does not constitute an asset which passes to Lazar as a "windfall", unjustly enriching her. When asked by the Court:

> "THE REFEREE: Do you think that you can get that (American Hospital's) rent from anybody else in New Jersey?
>
> THE WITNESS: No, Sir." (P. 46, 11. 13-15)

Receiver-debtor's effort to prove that the rental value of the property exceeded the rental paid by Overmyer under Lazar's lease (Ex. 1 - 1a)was totally unsuccessful. Their "appraiser", Sidney Hiller, adds nothing whatsoever to the record. His written appraisal, originally admitted in evidence as receiver's Exhibit A, was withdrawn by the Court and excluded from evidence on p. 102, 11.13, 14; see also, p. 86, 11. 19 - 22; and after hearing all of Mr. Hiller's testimony, the Bankruptcy Judge strikes all of it from the record:

> "THE REFEREE: You will, therefore strike all of Mr. Hiller's testimony. I believe it adds nothing to this case." (R. p. 103, 11. 11-13).

and, inclusive in this direction was Mr. Hiller's answers to hypothetical questions (R. p. 105, 11. 3 - 9).

Since neither debtor or receiver assigns this action of the Bankruptcy Judge as an error in their appeal, the record to this extent is intact. The sole evidence that any value passes to the landlord upon the adjudation of the lease termination is that, effective upon termination and continuing until the end of November, 1974, Lazar becomes entitled to the difference between the rental paid to her and the sublease rental paid by Americal Hospital which is approximately $6,100.00 per month and which, pursuant to an order of the Bankruptcy Judge, entered on January 25th, 1974, the receiver was required to escrow in a special account. Since the land and buildings were purchased and paid for by Lazar, and economic appreciation must have been contemplated when the lease was entered into, the only value shown in the record to pass to Lazar upon the termination of the lease is the escrow fund which should aggregate approximately $67,000.00. When viewed against the history of misconduct of the debtor, the arrearages still due the landlord, the total purchase price of the property, (approximately $750,000.00), the annual rental of approximately $100,000.00 and, finally, the litigation which the landlord faces in recovering this fund

(it has not been established that the escrow account exists and recovery might depend upon litigation with American Hospital to recover use and occupation for their occupancy); the sum of $67,000.00 does not constitute such a "windfall" to the landlord as would justify disregarding the obvious intentions of the parties and refusing to enforce their express intentions which has been sanctioned by Congress, 11 U.S.C. Section 110(b); all of which would be tantamount to unconstitutionally extending the power of the Federal government to impair obligations of a contract which power is limited to statutes under enabling provisions of the constitution. C.J.S. Section 275.

This, nevertheless, is the very basis of the appeal before this Court which is bottomed upon the Bankruptcy Court's equitable jurisdiction.

> "Although it has been broadly stated that a bankruptcy court is a court of equity, Young v. Higbee Co., 324 U.S. 204, 214, 65 S.Ct. 594, 89 L Ed.890, the exercise of its equitable powers must be strictly confined within the prescribed limits of the Bankruptcy Act. See Berry v. Root, Cir. 148 F.2d, 945, 946, Cetiorari denied, 326 U.S. 755, 66 S.G. 91, 90 L Ed. 453." Guerin v. Weil Gotshal and Manges, 205 F.2d 302, 04 (2d Cir. 1953).

> Even Bankruptcy Courts, which are essentially courts of equity administering a bankrupt's estate, are bound by the provisions of specific statutes. This court may not amend the statute by superimposing [illegible] equitable conditions not found therein." Lehman v. Cameron, 207 Misc. 919, 24, 139 N.Y.S. 2d 812, 17 (Sup. Ct. N.Y.Co. 1955).

The Bankruptcy Court is not required to judicially amend Section 70(b) of the Act without far more compelling authority than has been demonstrated by receiver-debtor and especially absent the very compelling equitable considerations which apparently moved those few courts who have acted in disregard of the statute.

The Supreme Court in 1944 considered a Chapter X trustee's claim that permitting cancellation of a lease by virtue of the reorganization would work an economic hardship on the debtor in the loss of valuable leaseholds and that the lease should not be terminated in accordance with the policy of the law disfavoring forfeiture. The court rejected this argument while recognizing the policy disfavoring forfeiture:

> "But an express covenant of forfeiture has long been held to be enforceable against the bankruptcy trustee." Finn v. Meighan, supra, at p. 301.

In fact, the doctrine of forfeiture apparently relied on by the receiver and debtor, is a rule of construction that the law will narrowly construe forfeiture provisions against the party who would benefit thereby. But, this doctrine does not ipso facto negate agreements clearly providing for forfeiture.

> "'The rule that a forfeiture clause is to be strictly construed means simply that no wider scope is to be given to the language employed than is plainly required. It does not require court to put a strained or overtechnical construction upon the language employed, ignoring the essence of the condition imposed....'" Urban Properties Corp. v. Benson, supra. at p.323.

There the 9th Circuit reversed a District Judge and allowed cancellation of a lease by landlord by reason of the filing of an arrangement proceeding and the debtor-in-possession's continuation, where the lease provided for forfeiture where "receiver or other officer or agent is appointed to take charge of the demised premises or the business conducted therein ...."

Debtor urged that since the cancellation provision did not expressly make the filing of an arrangement or the designation of the debtor-in-possession an act of

default, the law's antagonism to forfeiture required an interpretation of the lease that the arrangement and debtor-in-possession was not a circumstance requiring forfeiture. The court held that this language so plainly set forth the intention of the parties that the disfavor of forfeiture notwithstanding, the clear intention of the contracting parties must be enforced. The lease was cancelled. The Southern District of Ohio in 1963 held that filing a Chapter XI breached a lease agreement which required cancellation in the event "any proceedings in bankruptcy shall be instituted by or against the lessee..." The Court rejected the argument that because the law disfavors forfeiture, this provision should be so narrowly construed as to relate to bankruptcy proceedings under Chapters I through VII, but not to relate to a proceeding for the relief of a debtor under Chapter XI.

> "That respected rule of law, however, is without application until and unless an ambiguity is found to exist in the provisions under scrutiny, and we do not find that to be the present circumstances." In re Dan Cohen Co., supra, at p. 448.

It has not been asserted here that an ambiguity exists; instead, the equitable power of the court is

relied upon to negate the statute. But, not only are the equitable considerations showing windfall on the part of the landlord lacking; the very condition for the doing of equity, the existence of an "innocent suitor" likewise is missing.

> "But it is equally well established that that rule, being equitable, is not inflexible, and that such relief will be granted only to an innocent suitor, i.e., one with clean hands." U. S. v. Forness, 125 F.2d 928 (2d Cir. 1942).

Receiver-debtor's arguments are based upon three (3) cases, none of which constitute mandatory or even persuasive authority, and all of which attempt to draw support from a Supreme Court case which in fact support the position of the landlord in this proceeding.

Smith v. Hoboken R. Co., 328 U.S. 123, (1946,) involved a railroad reorganization under Section 77 of the Bankruptcy Act where the landlord - owner of the landlord's right of way sought to terminate the debtor railroad's right of way based upon the Section 77 proceeding violating a termination clause in the lease. The high Court adhered to its ruling two years' prior, Finn v. Meighan, supra, by holding that Section 70(b)

of the Act, 11 U.S.C. Section 110(b) applies to reorganization proceedings and that the forfeiture provision in the lease was effective against the trustee. However, they held that forfeiture in a railroad reorganization as distinguished from a reorganization under Chapter X which was before the Justices in Finn v. Meighan, was governed by another Act of Congress as well, Section 1(18) of the Interstate Commerce Commission Act which prohibited the abandonment of a railroad line without first receiving the consent of the Interstate Commerce Commission. The court held that the Interstate Commerce Commission Act represented the will of Congress and therefore, only the Interstate Commerce Commission and not the reorganization court could decide whether forfeiture of the lease would be inconsistent with the debtor railroad's reorganization. This was its specific holding. For a very clear explanation of the ruling in Smith v. Hoboken, see Zinn v. Hanover Bank, 215 F.2d 63 (2d Cir. 1954).

The high court went on to find that where public convenience, necessity and interest is involved, such questions should be considered by the legislative

and executive branch and not the judiciary.

The 3rd Circuit in, in re Fleetwood Hotel Corp., 335 F.2d 857 (3d Cir. 1964), erred in relying on Smith as authority for their deciding not to enforce the termination clause in a lease agreement brought before them in a Chapter X reorganization. There, a ninety-nine (99) year lease agreement for vacant land in Atlantic City upon which the debtor constructed a hotal at a cost of $1,400,000.00 in which approximately $575,000.00 of public stockholders' money was invested, was brought before the Court. The SEC was a party to these proceedings and urged protection of the public stockholders.

While Smith specifically held that the question was:

> "primarily for consideration and decision by the Interstate Commerce Commission and that the reorganization court should not have declared a forfeiture of the lease until the questions had been passed upon by the Commission." Smith v. Hoboken R. Co., supra, at p.129.

the 3rd Circuit in Fleetwood decided this question themselves.

Contrary to the very holding of the high Court, the 3rd Circuit incorrectly reads Smith as overruling

Finn v. Meighan, supra, which is contrary to the doctrine of stare decisis, see 21 C.J.S. 196; when in fact the only reason given by the Supreme Court for their refusal to enforce the bankruptcy termination clause in Smith was that the intention of Congress, evidenced in Section 70(b) of the Act, was further manifested by the Congress in the Interstate Commerce Commission Act. And that it was the will of Congress that the Interstate Commerce Commission and not the reorganization court consider whether the prohibition against terminations of rights of way found in the Commerce Act override contractual rights in railroad reorganization proceedings preserved in Section 70(b) of the Bankruptcy Act.

Exclusive of railroad reorganizations, the intention of Congress expressed in Section 70(b) of the Act remains unaffected by other legislation and therefore is paramount and controlling.

Weaver v. Hutson, 459 F.2d 741 (4th Cir. 1972, cert. den. 409 US 957, is the second case adopting forfeiture as a justification for not enforcing the lease agreement. This case stands no better or worse than Fleetwood upon which it expressly relies for authority;

which case has been humbly demonstrated to be either bad law or no law at all. Here, the phrase, "unjust enrichment" first appears. This reorganizing debtor had leased land purchased by its landlord for $3,100.00 which was valued at $150,000.00 at the time the Chapter X proceeding was filed. The debtor had built a motor hotel on the land at a cost of $925,000.00 of which $730,000.00 was financed by a mortgage with the landlord subordinating his fifty-two year lease to the mortgage.

> "...(A)ll rentals and percentages had been satisfied; that through the bankruptcy trustee's assurance, landlords have been relieved of any duty to the second trust of $110,000.00; (to which landlords had also subordinated)... that landlords financial interests are not in jeopardy; that as feared by the Securities & Exchange Commission appellee, a forfeiture would cause complete loss to debtor's creditors, stockholders and debenture holders; and finally, that forfeiture would prove a windfall of about $1,000,000.00 for the landlords." Weaver v. Hutson, supra, at p. 743.

Comparing these facts to the instant case, we again find the absence of public money, public interest or the exigencies of a Chapter X proceeding; an absence of a windfall, and more importantly significant unpaid rental and peril to the landlords.

The obvious distinction between Fleetwood & Weaver on the one hand and the Chapter XI proceedings have been noted by this Circuit in the matter of Queens Boulevard Wine and Liquor Corp. v. Blum, Fed (2d Cir. 6/11/74) docket #73-1512, Slip Sheet opinion on 4113, and by the Bankruptcy Judge below. In both reorganization proceedings, the significant investment by the public was present along with full payment to the landlords and ample protection and security for future performance of their leases.

The absence of an overriding public interest in a controversy involving competing private property rights, such as is presented to this Court, in the case at bar, would, one supposes, necessitate a hands off attitude by the Court and the enforcement of rights as prescribed by the written intentions of the parties themselves, i.e., the lease. The interposition of creditors in an arrangement proceeding offers nothing to change this assumption; see Speare v. Consolidated Assets Corp., 360 F.2d 882 (2d Cir. 1966) where our Circuit adhered to the principle of "forfeiture" subsequent to the Fleetwood case, notwithstanding the existence of creditors.

This very accurate assumption is confused but in no way rebutted by the Queens Boulevard case, supra.

In Queens Boulevard, a Chapter XI debtor was tenant under a lease with a landlord which contained a bankruptcy termination clause but which also provided that said clause would be unenforceable in the event there is no default existing under any other provision of the lease. During the arrangement proceeding, tender of one month arrearage in rental was made to and refused by the landlord who had another tenant ready to enter upon the premises at a substantially advanced rental and who sought possession of the premises. A divided Court of Appeals did not decide the issues presented by the lease provision waiving the bankruptcy termination clause in the event other defaults were lacking but rather held for the tenant by finding the lease intact and enforceable because the interests of creditors and a profitable debtor would be frustrated by an unwarranted economic gain on the part of the landlord unless the lease was enforced. There, it was expressly found that the debtor was about to confirm an arrangement proceeding for full payment to creditors who had already accepted the plan; that if the debtor's only premises were lost to it the plan could not be confirmed; and performance with the

landlord was adequately protected by a "sizeable security deposit" and that the default under the lease, separate and apart from the bankruptcy clause, constituted one months rent. Here, on the other hand, there is no security deposit; the operations are patently unprofitable; the receiver has not paid use and occupation for the month of November, 1973 and for the months of July, August* and September, 1974; the list of creditors manifest thatthe vast majority of creditors which the debtor seeks allegedly to protect, are the very landlords whose properties are affected by the decision of this Court (see Bankruptcy Judge's opinion below); that there is little or no possibility that the plan filed by the debtor can ever be confirmed and surely no acceptances of the plan have been tendered (see Bankruptcy Judge's opinion below); overwhelming arrearages in rental, which must be paid to landlords who seek their property by the debtor in order to conform to the Queens Boulevard holding in which they seek comfort, has been found by the Bankruptcy Judge to exist in excess of $12,000,000.00, (see Bankruptcy Judge's opinion below) and has been admitted by the debtor to be $1,000,000.00 (debtor's brief, pages unmarked); while Queens Boulevard was on the eve of confirmation, there is no showing here whatsoever as to how and where the

*checks for July and August, use and occupation, were received September 5, 1974.

cash necessary to confirm a plan would be available, no funds have been escrowed, no lender has committed himself to put up the sum which would range between $1,000,000.00 and $12,000.00; the one and only location of Queens Boulevard was protected by the Court of Appeals, while here this court views only one premises, Edison #24, while there is no evidence in the record that the loss of this property or even the loss of the properties owned by the other appellees, would frustrate a plan.

Perhaps the absence of such proof respecting the effect upon confirmation emanates from the fact that this debtor is so far away from confirming a plan that proof of the method of confirmation and its impediments simply does not exist. And this alone sufficiently distinguishes Overmyer from Queens Boulevard to affirm the Bankruptcy Judge's decision.

But an even more compelling reason exists for the affirmance of Bankruptcy Judge Babitt's decision. The Court of Appeals makes no effort to enunciate a rule of law to be followed in this or any other circuit and recognizes the continued applicability of Section 70(b):

> "Our decision does not deprive Section 70(b) of its statutory effect in those cases to which it is applicable. Bankruptcy forfeiture provisions are necessary for the protection of landlords and generally are enforceable".

Any attempt to establish a rule of law to be followed by other courts would be in derogation of Section 70(b) and would constitute disfavored judicial legislation. Instead, the Court merely exercised its equitable power as a Court of Bankruptcy limited to the parties and issues presented by the case before it and expressed no ratio decidendi which binds others to follow:

> "We hold only that, under the particular circumstances of this case, termination of Queens' lease would be grossly inequitable and contrary to the salutory purposes of Chapter XI".

This single exception embodies a court of equity's viewpoint as to the enforcement of equity in one case. Nothing more is added.

Bankruptcy Judge Babitt, therefore, Queens Boulevard notwithstanding, remains subject to the mandate of Section 70(b) and bears the same responsibility as did the court of equity sitting in Queens Boulevard, in determining whether the facts before him justify the invoking

of equitable considerations paramount to the language of the statute. His findings of fact differ from Queens Boulevard; his conclusions of law do not.

Judge Babitt found an unprofitable debtor filing a plan that never could be confirmed. He found there was no showing as to an availability of funds to confirm a plan and he found acceptance of a plan unlikely since the vast majority of creditors are the very landlords who are now litigating with the debtor to recover their properties and who can insure an ultimate favorable outcome by merely refusing to deliver acceptances without which a plan under Chapter XI cannot be confirmed. He found an absence of proof that the loss of individual properties would frustrate a plan; and he finds that the very creditors which Queens Boulevard sought to protect by equitable considerations, in Overmyer are the very landlords who are imploring the Court to stay their hand in equity and enforce the agreements between the parties. Considering factually, the findings of prejudice to the landlords and unlikelihood of confirmation of a plan, Judge Babitt concluded as a matter of law that Section 70(b) of the Act is effective; that bankruptcy termination clauses are enforceable; and, that, while as a matter of law equitable considerations might render a court of equity paramount to a statute,

the facts of this case do not justify such conduct.

All of the foregoing conforms to our doctrine of stare decisis, see 21 C.J.S Section 196. While courts are obligated to follow the holdings of earlier decisions of the same or higher courts within the same jurisdiction, apparent deviations are attempted to distinguish earlier decisions rather than overrule them. Thus, Smith v. Hoboken R. Co., supra does not overrule Finn v. Meighan, but constitutes a narrow distinction limited to one area, railroad reorganizations. Similarly, Queens Boulevard does not attempt to rewrite Section 70(b) or overrule earlier cases in our circuit by expressing a principle mandating that no lease will be cancellable in an arrangement proceeding where a landlord would profit but merely holds that in the case brought before it, the Bankruptcy court's equitable powers supersedes Section 70(b). Finally, Judge Babitt below, in accordance with stare decisis, was not obligated to follow the result of Queens Boulevard.

Even if this case relied on by the debtor-receiver is construed to establish a principle of equitable power to be enforced uniformly by bankruptcy courts (which would be in derogation of the statute and the doctrine of

stare decisis), the significantly different fact pattern presented by Overmyer to Bankruptcy Judge Babitt justifies his conclusions below. Lack of security, the history of defaults, the existence of arrearages, the failure to tender rent, the failure to file acceptances to a plan, the failure to demonstrate how acceptances can be obtained or how money to cure arreages and confirm a plan can be raised, the absence of any substantial class of creditors requiring protection other than the landlords themselves who have always prayed for an adjudication that the leases have been terminated, the existence of numerous locations; all bring Overmyer so far outside the scope of Queens Boulevard that its holding cannot be conclusive in this case.

POINT IV.

THERE HAS BEEN NO SHOWING THAT TERMINATION OF LAZAR'S LEASE WOULD FRUSTRATE AN ARRANGEMENT.

While the debtor-receiver asks this Court to excuse the bankruptcy clause default because it would frustrate or render impossible confirmation of a plan, there is not a scintilla of evidence in the record before this Court to support this assertion in their briefs. Moreover, their theory presupposes that a plan of

arrangement will be confirmed. The power of a court to affect a landlord's rights in an arrangement proceeding is founded upon the inconsistency of the enforcement of such rights with the purposes of the arrangement, in re Lane Foods Inc., 213 F Supp. 133 (S.D.N.Y. 1963); and, "whenever it appears that there is no possible likelihood of ultimate success, the legal and constitutional justification for restraining creditors (in a reorganization proceeding) from exercising their normal remedies disappears". In re Penn Central Transportation Co., 355 F Supp. 1343 (Ed. Pa. 1973). Therefore, the absence of any showing in the record that a confirmation of a plan is likely, deprives this Court of a purpose to protect by the invoking of equitable jurisdiction; and justifies permitting the agreement between the parties to speak for termination of the lease.

POINT V.

DEBTOR-RECEIVER'S BRIEF MISSTATE THE FACTS AND MISUNDERSTAND THE LAW.

Appellee's briefs are replete with assumptions that are not based upon facts in the record, with inferences which cannot reasonably be made from the record and with misinterpretations of prevailing authority.

RECEIVER'S BRIEF:

Great concern is expressed for unsecured creditors on p. 3 which allegedly would be devastated by a return of properties. If, however, these properties are as valuable as alleged, no damages would be suffered by the landlords for loss of rental when their properties have been returned to them. Since these landlords, as recognized by Bankruptcy Judge Babitt in his opinion, constitute most of the creditors, the need to protect creditors by a plan disappears pursuant to the decision below. Thus, the creditors for whom the receiver seeks equity will not exist. It is interesting that the receiver on p. 3, does not even allege that the debtor through the arrangement proceeding, has become profitable but tacitly admits the contrary by stating that its economic health has been "substantially improved under the management of Robert P. Herzog, the court appointed receiver".

While the receiver points out that not all landlords proceedings involve pre-petition rent defaults, on p. 7, the record clearly demonstrates substantial default here.

The reference to settle law that bankruptcy judges have equitable powers to prevent terminations of leases is far from demonstrated by the authorities. Rather, the prevailing principle is the contrary. Albeit the Court has on one occasion only held that a Chapter XI proceeding debtor involving private economic interest does merit the invoking of this extraordinary power, Queens Boulevard, supra.

Receiver's reporting of Smith v. Hoboken Railroad, supra, suggests a holding by the reorganization court that the express agreement of the parties must be subordinated to the purposes of the reorganization proceeding; when in fact, the holding was that the case presented two competing and conflicting Federal statutes. The Bankruptcy Act which compels the enforcement of bankruptcy termination clauses in leases, citing Finn v. Meighan, supra; and the Interstate Commerce Act creating the Interstate Commerce Commission which reserves to said Commission exclusively the power to suffer terminations of rights of way and railroad operations. The Supreme Court held that it was the intention of Congress that the Interstate Commerce Commission and not the reorganization court

determine the public interest and which statute will be effective. The reliance on Queens Boulevard by the receiver is without consideration of the significantly different facts which are brought before the Court there and here. His assertion that:

> "There is no serious opposition to the receiver's contention that the highly profitable long term leases have substantial value (p.20)"

is absolutely refuted by the references to the record on appeal hereinabove. Not only does Lazar oppose the contention that the Overmyer lease has value, but the record is completely devoid of any evidence of such value. The statement

> "The value derives from the profit the debtor earns under each lease, the length of the unexpired term, the fixed and often reduced rent payable to the landlords on renewal, the warehouse replacement cost and other standard extras"

is preposterous when the record again is devoid of any evidence to support these assertions. While this theory makes for good reading, it is simply not material to the issues on appeal since there is no evidence to support same. Exhibit A to this memorandum is equally preposterous, when it purports to ascribe the annual net profit to the subject property for the sum of $73,583.00, when the

receiver's right to a subleased rental will terminate in two months and there is no evidence whatsoever as to the rental value thereafter. (except for the Overmyer-Lazar lease).

Therefore, the windfall asserted on p. 21 of the brief simply does not exist in the case of Florence Lazar. The receiver's concern about landlords receiving more than the full dollar amount of their claims is an admission that a substantial amount of the creditors of the bankrupt will disappear by the enforcement of Judge Babitt's order. Concern need not be had for double recovery, since, in the event such fortunate landlords should file a claim in the proceeding, a trustee in bankruptcy or a debtor would be free to expunge this claim at a hearing before the Bankruptcy Court showing the "windfall" received by the landlord which would satisfy any claims which they might have. If upon a hearing the windfall is not established, as is exactly the case with Lazar, the peril of double recovery would not exist.

The receiver misunderstands the relationship of Queens Boulevard and the decision below by referring to a "rule of law enunciated in Queens Boulevard" (p.24) which the Bankruptcy Judge has not followed. As has been

previously demonstrated, no rule of law was espoused in Queens Boulevard. Rather, within the four walls of the case presented to the Court, an equitable power was held to supersede the enforcement of the statute (Section 70(b)) in that case and in that case only; so states the Court of Appeals at the end of the majority opinion. Queens Boulevard, therefore, does not establish a general principle to be followed by the courts in this circuit but if it constitutes binding authority at all, rather than constitute a single exception, its imperative extends only to cases involving substantially the same facts. Bankruptcy Judge Babitt below set forth ample findings of facts to take Overmyer outside the purview of Queens Boulevard.

The clever argument on ps. 26 and 27 respecting the ability of the debtor to confirm a plan ignores the right of landlords to lawfully frustrate any plan by withholding their acceptances, thereby depriving the debtor of any possibility to confirm a plan which was a condition precedent to the exercise of equitable powers in Queens Boulevard as well as Fleetwood & Weaver v. Hutson. This fact does not escape the Bankruptcy Judge's

attention, in his opinion below.

Receiver's reliance upon the Tampa decision is misplaced. Contrary to his assertions on p. 32, none of the findings quoted by the Bankruptcy Judge apply to the Edison 24 property. Disregarding, however, these findings, the receiver misunderstands or inaccurately reports Bankruptcy Judge Babitt's decision. The court below did not hold the bankruptcy termination clause of the lease effective or non-effective. All that was done below was to follow the Lane Foods case, supra, and stay enforcement of defaults - if any, - leaving for another time or for another court the question whether the bankruptcy termination clause mandates the termination of the lease. Here, on the other hand, by virtue of the rampant defaults and established prejudice to landlords, the Bankruptcy Judge in his wisdom, determined that a continuation of the stay of enforcement proceedings pursuant to Lane Foods was improper and thus was called upon to make a judgment whether the bankruptcy termination clauses were enforceable and whether a default existed. His conclusions of law enunciated in his opinion, have been demonstrated to be correct. Marked attention should be given to the self-serving assertions of the receiver on p.34, respecting

the confirmation of a plan. The conspicuous absence of any statement as to how much money will be required and the source of these funds construe a tacit admission of the accuracy of the Bankruptcy Judge's characterization of confirmation as "pie in the sky" hope.

The quotation of Mr. Stern's testimony on p.35 omits the Judge's characterization of Mr. Stern's receptiveness to collecting additional rental

> "I do not think anything pejorative is drawn by them". (R. p.49, ll. 17, 18).

Even more significant is the fact that this increased annual rental (which must be divided by twelve, terminates in November of 1974) and there is no evidence before this Court which could even justify an inference that a further profit would be received by the landlord.

Still another inaccurate generalization is found on p.36 concerning inactivity by landlords before the bankruptcy. Surely, the two prior actions instituted by Lazar would not constitute inactivity.

DEBTOR'S BRIEF:

References to the debtor's brief omit page numbers since the brief served upon appellees contain no page numbers.

The characterization of the early history to these proceedings is entirely unfounded, inflammatory and incorrect. Nothing less can be intended by the debtor except to prejudice the Court in its consideration of the appeal from the order below. The record speaks for itself and unwarranted and unsubstantiated attacks upon the conduct of the Court below can only redound to the disadvantage of the debtor. The schedule attached to this brief has not been admitted in evidence, is not part of the record on appeal and is wrong. Debtor's temerity in characterizing the landlords investment as "sound real estate investment(s)"because the mortgage on the property was backed up by "the financial worth" of Overmyer is ludicrous. This sound investment has resulted in landlords looking to their own resources to pay Overmyer's mortgages or face loss of their properties. The very case cited in support of the theory that equity will prevent a forfeiture, U.S. v. Forness, 125 F 2d, 928 (2d Cir.1942), cert. den., 316 U.S. 394 (1942) held that a lease was terminated by virtue of the tenant's non-payment of rent and suggests that equitable considerations require substantial justification for a default.

Debtor's assertion that Section 70(b) does not

apply to reorganizations or arrangements is simply contrary to the unanimous weight of authority in all of the briefs before this Court and serious attention will not be given to this theory.

The writer omits attention to the numerous mis-statements of facts and misinterpretations of law in the debtor's brief to the extent that they coincide with similar errors in the receiver's brief to which previous comment has been directed.

POINT VI.

FINDINGS OF FACT AND CONCLUSIONS OF LAW BELOW ARE SUFFICIENT.

Bankruptcy Judge Babitt has made findings of fact and conclusions of law which are clearly set forth in his thirty (30) page opinion. These findings of fact are required by Rules in Bankruptcy Procedure 752 (a) 11-61 and must be accepted by the District Court on Appeal unless they are clearly erroneous, Rule 810, 11-62.

These findings of fact have been referred to in detail hereinabove. They include the unlikelihood and even inability of the debtor to confirm a plan, the significant arrearages in pre-Chapter XI rent due the

landlord and the lack of evidence of a source of funds to cure these arrearages; the existence of numerous leaseholds held by the debtor; the absence of any over-riding public interest to be protected in this case; that upon return of properties to landlords, a substantial part of the general unsecured debt would be eliminated; the existence of other properties besides those which are the subject of the instant appeal; the staggering defaults of the debtor; the lack of tender of the rent arrearages; that the alleged "windfall" was nothing more than what the landlords originally bargained for in their leases; the lack of a security deposit available to the landlords; the absence of public debt or public holding of debtor's stock; the necessity of the receiver to divest itself of properties to provide a "wherewithal" to continue operations; in addition to others which have been inferentially referred to hereinabove. Since these findings of fact justify the conclusions of law rendered by the Bankruptcy Judge, i.e., that the bankruptcy termination clauses are enforceable, that breaches have occurred and that the leases are terminated, further findings are not required. The test in determining the findings of fact are sufficient is whether the findings will support the

conclusions of law which have been made, Shapiro v. Tweedie Footwear Corp., 131 F.2d 876 (3d Cir. 1942); in re Louis Hookerman, 49 F Supp. 827 (Ed. N.Y. 1943). The findings of fact below do justify the conclusions of law. And, appellees do not even contend that they are clearly erroneous. Therefore they are accepted; and further findings are unnecessary. While the cases cited by the receiver do hold that further findings are appropriate, in re Gentile, 107 F Supp. 476 (D.Ky. 1952); in re Ulrico Development, 311 F Supp. 1393 (D.P.R. 1970); these cases simply state that such findings are required when the Bankruptcy Judge failed to make sufficient findings of fact so that the accuracy of his conclusions of law could be determined. Since Bankruptcy Judge Babitt's findings of fact reported in his opinion are sufficient to enable this Court to determine the accuracies of his conclusions of law, further findings are not required.

CONCLUSION

LAZAR HAS DEMONSTRATED THAT SUBSTANTIALLY NO ASSET OR VALUE WILL PASS TO HER PURSUANT TO DETERMINATION OF OVERMYER'S LEASE THAT WAS NOT ORIGINALLY PAID FOR AND BARGAINED FOR BY HER IN HER PURCHASE AND LEASE-BACK OF THE PROPERTY. THIS COMPLETELY DISPOSES OF THE WINDFALL-UNJUST ENRICHMENT THEORY

ARGUED, BY THE RECEIVER-DEBTOR. THE ABSENCE OF WINDFALL TOGETHER WITH THE LACK OF ANY SHOWING THAT A PLAN OF ARRANGEMENT WILL IN FACT BE CONFIRMED AND THE VASTLY DIFFERING FACTS AND CIRCUMSTANCES BETWEEN QUEENS BOULEVARD AND OVERMYER AMPLY SUPPORT THE DECISION BELOW AND MANIFESTLY DEMONSTRATE THAT ANY CONTRARY HOLDING BY THE BANKRUPTCY JUDGE WOULD HAVE BEEN ERRONEOUS.

THE DECISION BELOW SHOULD BE AFFIRMED AND ALL STAYS AGAINST FURTHER PROCEEDINGS IN ENFORCEMENT OF THE BANKRUPTCY JUDGE'S ORDER SHOULD BE WITHDRAWN.

Respectfully submitted,

HENRY & BRECKER
Attorneys for
Florence Lazar, et al.

MARTIN F. BRECKER,
Of Counsel.

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